No. 20309

IN THE

United States Court of Appeals For the Ninth Circuit

OLA HENDRICKS and JANE DOE HENDRICKS, his wife, and THORLEIF PETERSEN and JANE DOE PETERSEN, his wife,
Appellants,

v.

OLAF ONA,
Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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ARGUMENT IN SUPPORT OF JUDGMENT*

INTRODUCTION

Appellants acknowledge at page 15 of their brief, appeals in admiralty are not trials *de novo* and that District Court findings are binding unless clearly erroneous. *McAllister v. United States,* 348 U.S. 19, 75 S. Ct. 6, 99 L.Ed. 3; *Grantham v. Quinn,* 344 F.(2d) 590 (CCA 4); *U.S. v.*

Guide to Terminology and Abbreviations Used in this Brief. The abbreviation "R" is used to designate the page of the record of the pleadings, motions, judgment and similar documents. The abbreviation "Tr" is used to designate the page of the testimony and trial proceedings.

SS Soya, 330 F. (2d) 732, 735 (CCA 4, 1964). Furthermore as stated in *Cunningham v. Rederiet Vindeggen,* 333 F.(2d) 308 (CCA 2, 1964),

> ". . . it is clear that *a trial court's findings as to damages are to be accorded just as much weight on review as other findings of fact,* e.g., *Lukmanis v. United States,* 208 F.(2d) 260 (2 Cir. 1953) *(per curiam); Carroll v. United States,* 133 F(2d) 690 (2 Cir. 1943); and, in suits in admiralty as well as in other cases, a reviewing court may not overturn a lower court's findings of fact unless the reviewing court is convinced that the finding is 'clearly erroneous'."

It is libelant's contention that the record in this case bears out the following:

1. There was an oral contract of employment between the parties whereby libelant was to join the crew of the FV "SEA STAR" as a crab fisherman in August, 1963, and was to be compensated on a share of the catch basis.

2. It was implicit that libelant was to be given reasonable notice by appellants as to when and where he was to join the vessel.

3. That libelant was given improper and untimely notice and that this constituted a wrongful repudiation of the contract.

4. That appellants wrongly hired another man, Arne Haugen, to replace him.

5. That but for appellant's wrongful repudiation of the contract in August, 1963, libelant would have earned at least as much as did his replacement during the period

from August, 1963, through March, 1964.

All of the above contentions were adopted in substance by the trial court in its Findings of Fact.

THE CONTRACT

Findings of Fact IV and V set out the essential terms of the contract between the parties. Appellant makes no specification of error regarding either finding. The findings are as follows:

"IV

"That in the month of June, 1963, respondents entered into an oral contract of employment with libelant under the terms of which libelant was employed as a seaman and fisherman in the crew of the FV "SEA STAR" for the coming crab fishing season to commence shortly thereafter." (R.33)

"V

"That under the terms of said contract, libelant was to join said vessel in Alaskan waters in August, 1963, and libelant was to receive as compensation for his services a full share of the proceeds of the catch of said vessel in accordance with the custom and practice in the crab fishing industry." (R.33)

THE BREACH OF CONTRACT (INADEQUACY OF NOTICE)

Finding of Fact No. IX to which no specification of error is made states:

"That on August 10, 1963 (Saturday), respondent, Thorleif Petersen notified libelant by phone that he was expected to join the FV "SEA STAR" on Kodiak Island, Alaska, on the following Monday, two days later." (R.34)

It was this notification which the court in Finding No. X held to be "improper, untimely and unreasonably short under the circumstances". (R.34)

Appellants admit at page 6 of their brief that "in fact, there was no flight (from Seattle) by which a man could arrive in Kodiak on Monday . . ." and yet, notwithstanding this, they contend that the court erred in finding this notice to be improper and unreasonable.

The general law applicable to this question of what is fair and reasonable and what obligations are owed by the parties is set forth in 17 Am.Jur.(2d) "Contracts" § 256, pages 653-654:

> "*Every contract implies good faith and fair dealing between the parties to it,* and a duty of cooperation on the part of both parties. Accordingly, whenever the cooperation of the promisee is necessary for the performance of the promise, there is a condition implied that the cooperation will be given. Indeed, it may be said that contracts impose on the parties thereto a duty to do everything necessary to carry them out. When one undertakes to accomplish a certain result he agrees by implication to do everything to accomplish the result intended by the parties. *If the giving of notice is requisite to the proper execution of a contract, a promise to give such notice will be inferred.* Moreover there is an implied undertaking in every contract on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out his part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Ordinarily if one exacts a promise from another to perform an act, the law implies a counter promise against arbitrary and

unreasonable conduct on the part of the promisee." (Emphasis added)

As stated in *Wells v. Alexandre,* 130 N.Y. 642, 29 N.E. 142 (1891),

> ". . . If a notice was requisite to its (the contract's) proper execution, a covenant to give such notice will be inferred, for any other construction would make the contract unreasonable and place one of the parties entirely at the mercy of the other."

Further, as stated at 17A CJS 'Contracts" § 504 (1) (d) at page 795,

> "Although time is not made of the essence of a contract by express stipulation, the party to whom performance is due may make it essential by giving notice to perform . . . but such notice must allow a reasonable time to the other party to perform."

Not only was the date given an impossible one to meet, but the means by which it was transmitted was manifestly unsatisfactory since appellant Hendricks admitted he could have sent a telegram or wire or could have telephoned appellee directly, but that instead he sent a letter which took at least an additional two days and perhaps more.

On this point appellant Hendricks testified as follows:

Q. "You could have sent him a telegram or a night letter or a wire?

A. "I could have." (Tr. 53)

Q. "When did Dennis send the letter?

A. "I imagine it would have been a day or two before, because it is airmail.

Q. "If you wanted to call somebody on the telephone from where you were, in Moser Bay, you could do it?

A. "Yes, I could." (Tr. 54-55)

Q. "You could send a telegram, also?

A. "Yes, I could." (Tr. 55)

Q. "Now, but for the fact according to your testimony that Mr. Ona couldn't join the vessel on two days' notice, Saturday when he got the notice until Monday, he would have had his chance on the "SEA STAR" if he was available, is that correct?

A. "I so stated, if he was available." (Tr. 57)

On this same point, witness, Dennis Petersen, appellant Petersen's son, testified as follows:

Q. "Incidentally, when you were in the cannery, where you described this microphone arrangement, and the loud speakers, or whatever . . . was there any problem of hearing, any problem of communicating back and forth?

A. "There was a little static, but other than that, there wasn't any problem.

Q. "You could hear what was on the other end, is that correct?

A. "Yes.

Q. "You could make yourself understood at the other end?

A. "Yes.

Q. "So, in other words, there was instantaneous communication facilities available between Seattle and Moser Bay?

A. "By radio phone you mean?

Q. "Yes.

A. "Yes, it took us an hour to get from the boat down to the cannery." (Tr. 268-269)

It is admitted that libelant's replacement, Arne Haugen, joined the vessel on Tuesday, August 13, and according to witness, Dennis Petersen, the letter to Thorleif Petersen in Seattle directing Petersen to advise Ona of the crucial date was sent approximately one week prior to that date. (Tr. 269-270) Thus instead of a 48 hour notice, libelant could have been given seven days notice.

As to the custom of the fishing industry regarding notice, witness Peter Myhre testified as follows:

Q. "Isn't it also the custom in the fishing industry, Mr. Myhre, to try to give a crew member or someone who is going to join the vessel, as much notice as you possibly can?

A. "That is right.

Q. "So, in this case, they could have given Mr. Ona at least two more days notice by simply sending a telegram or a wire; isn't that right?

A. "That is right." (Tr. 250)

Witness Dennis Petersen's testimony regarding the appropriateness of the means chosen to notify appellee is also pertinent:

Q. "Is it fair to say, Mr. Petersen, if you want to get an important message to Seattle quickly, you get on the telephone at Moser Bay and call Seattle?

A. "Yes.

Q. "Certainly, if you wanted to get an important message to Seattle, and time was important, this is what you would do; isn't that correct?

A. "It depends on how important it was.

Q. "Well certainly, if it concerned—if time was of the essence, and it concerned many thousands of dollars you would do it, wouldn't you?

A. "Yes, definitely." (Tr. 273-274)

In short, there is abundant evidence in the record to support the inescapable conclusion that the means of communicating this crucial notice was, to say the least, impractical and that the specifications contained in the notice were impossible to meet.

It is also interesting to note what transpired on Saturday, August 10, 1963. After appellant, Thorleif Petersen, received the letter from Alaska, he called Mr. Ona on Saturday morning between 9:30 and 10:00 o'clock. Thorleif Petersen testified concerning the phone conversation with libelant on Saturday as follows: (Tr. 325).

Q. "And you told him to take the next flight to Kodiak?

A. "I didn't say that.

Q. "What did you tell him?

A. "I told him to be there on Monday." (Tr. 326)

Q. "And he, according to your testimony, he told you that he couldn't leave before the latter part of the week, Wednesday or Thursday; isn't that what he said?

A. "That is correct.

Q. "And then you told him that you would think it over, and call him back?

A. "That's right, because--" (Tr. 326)

Q. "That was all you told him, isn't it?

A. "Right." (Tr. 327-328)

Q. "But you testified, did you not, that you called Mrs. Ona later in the afternoon, didn't you?

A. "I called her around 6:00 o'clock.

Q. "And you told him the deal—and you told her that the deal was off?

A. "That is correct, because—" (Tr. 328)

Q. "So then, in effect, Mr. Petersen, you cancelled Mr. Ona's chance on the "SEA STAR" before you ever told him about Mr. Haugen, or the possibility that you might have another man?

A. "That is correct.

Q. "By 6:00 o'clock that evening his chance was gone, right?

A. "That is correct." (Tr. 330-331)

Q. ". . . I asked you, yes or no, did you tell him, on Saturday, in your conversation with him that you were considering another man?

A. "No, I don't see where it is any of his business." (Tr. 332)

Q. "And you never called Mr. Ona back and said, well, it would be all right if you took the direct flight on Tuesday, did you?

A. "No, I did not.

Q. "You told him it was Monday or nothing, right?

A. "That is right." (Tr. 334)

The above testimony certainly reveals an absence of the requisite "fair dealing", if not "good faith".

As to appellant's contention that libelant's statement on Saturday, August 10, (which is disputed by libelant him-

self) that he could not join the vessel until "later in the week" constituted an anticipatory breach of the contract between the parties, this position is unsupportable based either on the facts of the case or the applicable law. According to 17 Am.Jur.(2d) "Contracts" §448 at page 912,

> "An anticipatory breach of contract is not established by a negative attitude or one which indicates more negotiations are sought or that the party may finally perform."

See also 17 Am.Jur.(2d) "Contracts" § 450 at page 914,

> "In order to justify the adverse party in treating the renunciation as a total breach, the refusal to perform must be of the whole contract or of a promise or obligation going to the whole consideration, and it must be distinct, unequivocal and absolute."

As indicated *supra,* when informed that libelant couldn't leave before the latter part of the week (Wednesday or Thursday), respondent Petersen simply told libelant that he would "think it over, and call him back" which according to his own admission, he never did. (Tr. 334)

Further, according to 17 Am.Jur.(2d) "Contracts" § 450 at page 914,

> "To constitute an anticipatory breach based on a request for a modification of terms, such request must be coupled with an absolute refusal to perform unless the request is granted."

Accordingly, in *Palmeiro v. Spada Distributing Co.,* 217 F.(2d) 561 (CCA 9, 1954), a potato dealer brought suit on an alleged oral contract with a farmer. The court succinctly held that,

". . . The question of breach of any contract, oral or written, is a question of fact to be left to the trier of fact . . ."

The court in *Palmeiro* also observed that,

"An anticipatory breach of contract is not established by a negative attitude or one which indicates more negotiations are sought or that the party may finally perform."

To summarize, even if appellant Petersen's version of the Saturday morning conversation with libelant is accepted, libelant's statement can hardly be classified as the "distinct, unequivocal, and absolute" refusal to perform required under the law. 17 Am.Jur.(2d) "Contracts" § 450 at page 914. In this case, it was appellants' untimely, unreasonable and improper notice that constituted the renunciation or breach of the contract between the parties.

MEASURE OF DAMAGES

In *Putnam and Overman v. Lower, et al,* 236 F.(2d) 561, (CCA 9), the court discussed the general maritime law applicable to the fishing lay or share in earnings agreement, in the following terms:

"That the initial exercise of power therein was maritime is clear, since the cause originated as a libel for wages and damages resulting from wrongful action relating to a fishing lay. Ever since the opinion of Justice Storey in *Harden v. Gordon* (1823, 2 Mass. 541), it has been settled in the maritime law of the United States that seamen are the wards of Admiralty and as such the courts of admiralty vigilently guard against any encroachment upon their rights. The jurisdiction

> of the courts of admiralty over the wage claims of seamen is anciently established. From the dawn of maritime commerce, the necessity for skilled and courageous mariners has been recognized and the law jealously protected them as to certain and prompt payment of wages or compensation by other methods. Originally, seamen were compensated by a stake or share of the profits of the voyage. More recently, it has become customary to pay fixed wages, but the old form survives in the lay plan employed in the more speculative pursuits of sealing, whaling and fishing. Fishermen, although possessing wages and customs peculiar to their business, are nonetheless seamen, and in general receive the same protection."

The voyage in the *Putnam* case was never completed, therefore, lost profits could not be measured, but the court did state:

> ". . . The gauge of damages for breach of nearly all commercial contracts is the value of the future profits encompassed by the contract, nevertheless such profits must be determined with reference to some substantial criterion, without which any award would be merely speculative . . . *Prospective profits are generally allowed* only where there is an established going business or *where the job contracted for was subsequently completed by another, thereby realizing the profits . . .*" (Emphasis added)

Here the employment opportunity which was wrongfully denied to libelant was fulfilled by another (Haugen) and Haugen's earnings provide us with a liquidated measure of damages.

The questions of how long libelant would have remained in the service of the vessel but for the breach of contract and how much he would have earned are questions of fact.

The court based its findings and conclusions regarding this point on an abundance of testimony and evidence largely offered by appellants themselves. It goes almost without saying that unless appellants thought Mr. Ona capable of satisfactory performance in the crew of the FV "SEA STAR", they would not have made arrangements to hire him, and yet they now seem to contend that libelant was either too old or too sick to do the job. If they didn't think he could do the job, why did they hire him in the first place?

Appellants in their brief at page 33 acknowledge that hypothetical questions were placed by libelant's counsel to appellants and several other witnesses and that all testified that appellee would probably have remained on the vessel through the Spring season of 1964 if his work was satisfactory (Tr. 23, 24, 42, 43, 189, 208, 254 and 255).

Libelant's Exhibit No. 2, a signed statement of witness, Peter Myhre, another crew member of the FV "SEA STAR", admitted without objection, (Tr. 246) states in part that,

> "Most likely when a crew member gets a chance on a crab boat, he stays on the vessel until the end of the Spring season, unless the fisherman quits or can't get along with the Skipper . . . Presumably had Ona joined the vessel, he would have stayed on until April, 1964."

Libelant's replacement, Arne Haugen, testified as follows:

Q. "And did all the crew members who wanted to stay

on rejoin the vessel after New Years?

A. "Yes.

Q. "And they continued to crab fish until the following April, is that right, on the vessel, when the vessel returned to Seattle?

A. "Yes." (Tr. 203)

Q. "So, your total earnings on the "SEA STAR", in the Fall season of 1963, and the Spring season of 1964, which approximates $10,744.61 in the Fall, and about $4,500.00 more in the Spring would have been even greater had you stayed on past November 18, and not taken some time off; and furthermore, had you not been injured and missed out on the last six weeks of the season, isn't that correct?

A. "That is right.

Q. "So, then, if Mr. Ona had your job, isn't it fair to say that he would have earned at least as much as you did?

A. "Yes.

Q. "Is that correct?

A. "That's correct." (Tr. 204)

Q. "Now, let me ask you, what we lawyers call a hypothetical question which assumes certain facts. Now, I want to ask you this: Assuming that Mr. Ona had joined the vessel, in August, 1963, do you see any reason why he wouldn't have stayed on until the end of the season, in April of 1964?

A. "Well, if he qualified, he would have stayed on, I guess.

Q. "If he joined the vessel, he would have earned at least as much as you did?

A. "Yes." (Tr. 208)

On this point witness Ness testified to the same effect:

Q. "Normally speaking, Mr. Ness, doesn't the same crew member who was on the vessel in the Fall season continue on into the Spring season, assuming (1) he wants to, and (2) he is doing a reasonably good job?

A. "Yes I suppose he is on." (Tr. 183)

Thorleif Petersen himself admitted that the crab fishermen hired in the spring to commence fishing in the summer, usually continue in the service of the vessel through the following spring when he testified as follows:

Q. But, assuming that the crew member is hired on the vessel in April, or May and starts in July, if he wants to stay in, assuming he does a reasonably good job, and he is a reasonably good fisherman, he would stay on the vessel, if he wanted to, at least, until the following April; is that right?

A. "——

Q. "As a general rule?

A. "As a general rule, yes." (Tr. 23-24)

Furthermore, there is a dearth of evidence to indicate that Mr. Ona would not have been able to satisfactorily perform the job of a crab fisherman. The following excerpt from the testimony of witness Ness (with the question posed by appellants' own counsel) indicates how appellants attempted and failed to create this impression:

Q. "Based on the observations you have made of Mr. Ona's work on the pots and your knowledge of the operations, do you have an opinion as to whether or not you would have retained him as a member of the crew?

A. "No, I got no opinion . . ." (Tr. 168)

Not only does the testimony in the record fail to bear out appellants' contentions regarding the evidence on damages, the cases which they cite fail to support their legal conclusions in this regard. Appellants in their brief have discussed the case of *Vitco v. Joncich,* 130 F.Supp. 945 (S.D. Cal. 1955), Aff'd by Per Curiam opinion in *Joncich v. Vitco,* 234 F.(2d) 161 (CCA 9, 1956). In the *Vitco* case, libelant signed articles on a tuna vessel "for a term of time not exceeding twelve calendar months".

The union contract provided:

> "For boats fishing tuna all year around, there shall be two tuna seasons within a year, one season shall commence on January 1, and end on the following June 30 and the next tuna season shall commence on July 1 and end on the following December 31."

As stated in appellants' brief at page 40, the libelant in *Vitco* fell ill in late January and left the vessel at that time. Under these circumstances, the trial court held that he was entitled to his share of the catch for the second half as well as the first half of the year, notwithstanding the fact that libelant did not serve beyond the first month of the first season. In support of its conclusion (which was quite comparable to the conclusion reached by the court in this case), the trial court in the *Vitco* case relied on the ancient and unique principles of maritime law relating to unearned wages, whereas in the instant case, the court need only look to the elementary principles of contract damages discussed *supra* to sustain libelant's award. This is a simple contract damage case and appellants' attempt to apply isolated maritime principles, frequently out of context, serves

only to confuse rather than to clarify.

The precise measure of damages awarded by the court were based on Admitted Facts 6 and 7 contained in the pretrial order:

> "6. That Arne Haugen (the person who took the position in the crew of the FV "SEA STAR" which libelant claims should have been his) earned the sum of $10,744.61 for the crab fishing season of 1963 and that Mr. Haugen earned the additional sum of $4,526.36 in the year 1964 as a member in the crew of said vessel until he left said vessel due to injury in March, 1964. (R.22)
>
> "7. That libelant from August 10, 1963 through December 31, 1963, earned the sum of $1,644.31 in the crew of the FV "CHELSEA" and libelant earned the additional sum of $499.44 through April 24, 1964 in the crew of said vessel." (R.22)

Based upon the above admitted facts and the abundance of testimony previously discussed, the court made the following computation of damages:

Haugen's earnings on the FV "SEA STAR", August 13, 1963 through March, 1964.	$15,270.97
Libelant's earnings by way of mitigation of damages during above period.	2,143.75
	$13,127.22

CONCLUSION

The above figure of $13,127.22 is the amount of damages libelant asked for, the amount proven on trial, and the

amount awarded by the court. The judgment should be affirmed.

Respectfully submitted,

LEVINSON & FRIEDMAN
By: RONALD J. BLAND
Proctors for Libelant

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with these rules.

(s) Ronald J. Bland
Proctor